



NEIL ASERCROMBIE  
GOVERNOR

BRIAN SCHATZ  
LT. GOVERNOR

STATE OF HAWAII  
OFFICE OF THE DIRECTOR  
DEPARTMENT OF COMMERCE AND CONSUMER AFFAIRS  
335 MERCHANT STREET, ROOM 310  
P.O. Box 541  
HONOLULU, HAWAII 96809  
Phone Number: 586-2850  
Fax Number: 586-2856  
[www.hawaii.gov/dcca](http://www.hawaii.gov/dcca)

KEALANI S. LOPEZ  
DIRECTOR

PRESENTATION OF  
DEPARTMENT OF COMMERCE AND CONSUMER AFFAIRS  
OFFICE OF ADMINISTRATIVE HEARINGS

TO THE HOUSE COMMITTEE ON  
FINANCE

TWENTY-SIXTH STATE LEGISLATURE  
REGULAR SESSION, 2012

Date: Monday, February 27, 2012  
Time: 11:30 a.m.  
Conference Room: 308

TESTIMONY FOR HEARING ON HB 2044, HD1  
RELATING TO PROCUREMENT

TO THE HONORABLE MARCUS R. OSHIRO, CHAIR, & THE HONORABLE  
MARILYN B. LEE, VICE CHAIR, AND MEMBERS OF THE COMMITTEE:

The Office of Administrative Hearings ("OAH") of the Department of Commerce and Consumer Affairs ("DCCA") appreciates the opportunity to offer comments for the Committee's Hearing on HB 2044, HD 1, relating to Procurement. My name is David Karlen, and I am the Senior Hearings Officer of the OAH. OAH and DCCA oppose HD 2044, HD 1.

The OAH has administered the hearings on procurement protests since the Legislature established the Procurement Code, Chapter 103D of the Hawaii Revised Statutes, in 1993. .

Hawaii's Procurement Code was based on the American Bar Association's Model Procurement Code for State and Local Governments. HB 2044, HD 1, would enact two major procedural changes to the way procurement protests are conducted at the administrative level. The OAH does not believe that these changes would be of benefit to the administrative review process.

**1. The Existing De Novo Review Process Should Not Be Changed**

The 1993 Procurement Code established that procurement protests would be decided on a *de novo* basis. HB 2044, HD 1, retains *de novo* review for determinations of bidder responsibility under Section 103D-310 and debarment and suspension proceedings under Section 103D-702. There are hardly ever any protests filed under these statutes. However, it eliminates *de novo* review for protests of solicitations and awards under Section 103D-701. OAH strongly believes this change is not warranted because: (a) it will undermine public confidence in the procurement process; and (b) it will be counterproductive and lead to greater complexity and delay in the procurement protest process.

*De novo* review means, in essence, that the procuring agency's decisions are based on the matters originally presented by the protester to the agency but without the influence of the decision of the agency official who made the initial evaluation of the protest. It enhances public confidence in the procurement system by eliminating any perception that an agency official with a presumably vested interest in upholding the decisions of his or her agency as to the choice of contractors does not have an inordinate influence on the protest.

In 2000, seven years after the passage of the Procurement Code, the American Bar Association published the last updated version of its Model Procurement Code for State and Local Governments. This latest version retains the provision for *de novo* administrative review that the Legislature originally adopted in 1993.

Testimony previously submitted by a lobbying group to the House and Senate with respect to this bill and a similar bill mistakenly claimed that the American Bar Association had changed its Model Procurement Code in the year 2000 to eliminate *de novo* review in the case of administrative review. That was not, in fact, the case.

In testimony before the Senate Committee on Judiciary and Labor on Friday, February 24, 2012, this group admitted that it was incorrect.

This group also complained about an unidentified case where the issues supposedly ballooned from two to seventeen at the administrative hearing. Such an anecdotal claim is no reason to throw out an entire system. Further, OAH is very careful to limit its review to issues previously presented to the agency and not take on new issues. That is already the law. In order to reiterate that law, it is not necessary to throw out the entire protest system.

That group has further complained about the result of one past decision. One side can always complain about a result. If a decision is not acceptable, it can be appealed to court. The present legislation does not address any such individual problem.

The "best practice" is to continue to follow the Model Procurement Code and retain *de novo* review.

**2. HB 2044, HD1, mandates an unworkable procedure that will lead to substantial delays at the agency level before a procurement protest is ever filed and inadequate time to review an agency decision.**

The bill requires the procuring agency to prepare "a record of the protest proceedings" but provides no guidance as to what constitutes a "record." If, administratively, the agency decides a protest based solely on letters and other documents, the agency is not obtaining "live" evidence that is often relevant to deciding what happened and why. As noted above, there will be no confidence that such an in-house review of documents creates an accountable, transparent procurement process.

On the other hand, if the agency, as it should in at least some protests, goes beyond the paperwork, the agencies are not equipped to take and preserve oral testimony as well as to prepare an investigative report that puts its own employees to the test by going beyond the surface of documents or self-serving documents.

There is no time limit on the agency process. In order to do a proper job without the benefit of the adversarial process conducted by a professional hearings officer, the agency will end up taking more time than normally involved in resolving procurement protests. Presently, the real delay in bid protests stems from agency delay in resolving the initial protest because of the absence of time limits on that activity. (In a 2011 case, the agency took 5 months while OAH resolved the protest, including a full evidentiary hearing, in 45 days). HB 2044, HD 1, will only make matters worse.

To compound the problem, the current proposed legislation has an absolute time limit of thirty (30) days. Yet it gives the agency ten (10) days to file the administrative record, with no stated penalties for noncompliance. It is thus in the agency's interest to

be late and use up more than ten days of the thirty day total because failure to conclude the proceeding in thirty days automatically means the agency's decision is upheld.

In the remaining twenty days, even assuming the agency timely files the record, the OAH hearings officer is supposed to receive briefs, hear oral argument, take new evidence where appropriate, and issue a written decision that explains the basis for a decision no matter which party prevails. This is more involved than a Circuit Court review where new evidence would not be allowed, is totally unrealistic if the case is at all complicated, and will lead to further erosion in public confidence in the viability of the procurement protest process.

We respectfully direct the Committee's attention to HB 1671, Proposed HD 2, which revives Act 175 of the 2009 Legislature. It is also scheduled for consideration by this Committee today. Except for one section not in HD 1 to which OAH objects, it responsibly streamlines the procurement protest process by setting up a 45 day time limit that has proved to be workable in practice from July of 2009 to June of 2011. It creates minimum threshold amounts for protests in order to discourage minor complaints. It also requires protestors to file a bond, thus eliminating protests meant merely to delay matters without any hope of success. This measure was proposed by the State Procurement Office (SPO). The SPO surveyed a large group of stakeholders involved in procurement and circulated two drafts before making its final proposal through HB 1671. The OAH was consulted during this process and supported the SPO's comprehensive efforts that culminated in HB 1671.

The present measure, in contrast, did not go through any such process. No actual evidence has been presented to the Legislature or OAH concerning the need for

Testimony on House Bill No. 2044  
February 27, 2012  
Page 6

the proposed changes or the identification of other jurisdictions with similar provisions so that their experience with this system could be investigated.

Thank you for the opportunity for OAH to provide its comments on this proposed legislation.

**BIA-HAWAII**  
**BUILDING INDUSTRY ASSOCIATION**

**Testimony to House Committee on Finance**

Monday, February 27, 2012

11:30 a.m.

Capitol Room 308

**RE: H.B. 2044 HD1, Relating to Procurement**

Good morning Chair Oshiro, Vice-Chair M. Lee, and members of the Committee:

My name is Gladys Quinto Marrone, Government Relations Director for the Building Industry Association of Hawaii (BIA-Hawaii). Chartered in 1955, BIA-Hawaii is a professional trade organization affiliated with the National Association of Home Builders, representing the building industry and its associates. BIA-Hawaii takes a leadership role in unifying and promoting the interests of the industry to enhance the quality of life for the people of Hawaii.

BIA-Hawaii **strongly supports** H.B. 2044, HD1. The intent of the bill is to simplify and expedite the procurement appeal process by recognizing the procuring agency's experience and expertise in the procurement process, while preserving the right of review of a procuring agency's decision to the Department of Commerce and Consumer Affairs (DCCA) Office of Administrative Hearings (OAH).

This bill retains a bid protester's right to a hearing before the OAH, but limits the hearing officer's review to the record of the procuring agency's decision below. Under this bill, the OAH review is generally limited to a review of the written record of procuring agency's protest proceedings for evidence of decisions that may be arbitrary, capricious, fraudulent, or clearly erroneous.

This bill balances the desire to expedite procurements delayed by constant protest appeals while preserving a limited right of review of a procuring agency's decision to the DCCA OAH.

For the foregoing reasons, BIA-Hawaii is in **strong support** of H.B. 2044, HD1, and respectfully requests your Committee pass this measure.

Thank you for the opportunity to share with you our views.

1065 Ahua Street  
Honolulu, HI 96819  
Phone: 808-833-1681 FAX: 839-4167  
Email: [info@gcahawaii.org](mailto:info@gcahawaii.org)  
Website: [www.gcahawaii.org](http://www.gcahawaii.org)



**GCA of Hawaii**

GENERAL CONTRACTORS ASSOCIATION OF HAWAII

Quality People. Quality Projects.

Uploaded via Capitol Website

February 27, 2012

TO: HONORABLE REPRESENTATIVES MARCUS OSHIRO, CHAIR,  
MARILYN B. LEE, VICE CHAIR AND MEMBERS OF THE HOUSE  
COMMITTEE ON FINANCE

SUBJECT: **STRONG SUPPORT OF H.B. 2044, HD1, RELATING TO  
PROCUREMENT.** Limits the hearing officer's review to the record of the  
procuring agencies below. Limits the review to a review of the written record of  
the procuring agency's protest proceedings for evidence of decisions that may be  
arbitrary, capricious, fraudulent, or clearly erroneous. Effective July 1, 2112.

HEARING

DATE: Monday, February 27, 2012  
TIME: 11:30 a.m.  
PLACE: Conference Room 308

Dear Chair Oshiro, Vice Chair M. Lee and Members of the Committee:

The General Contractors Association (GCA) is an organization comprised of over six hundred (600) general contractors, subcontractors, and construction related firms. The GCA was established in 1932 and is celebrating its 80<sup>th</sup> anniversary this year; GCA remains the largest construction association in the State of Hawaii. GCA is submitting testimony **in strong support** of H.B. 2044, HD1, Relating to Procurement.

H.B. 2044, HD1 proposes to simplify and expedite the procurement appeal process by recognizing the procuring agency's experience and expertise in the procurement process, while preserving the right of review of a procuring agency's decision to the Department of Commerce and Consumer Affairs (DCCA). This bill proposes to amend a hearing officer's review of the procuring agency's decision in a bid protest under section 103D-701, HRS, by removing *de novo* review.

GCA supports H.B. 2044, HD1 and its intent of simplifying and expediting the procurement appeal process. This bill generally (1) limits the hearings officer's review to the record of the procuring agency's protest proceedings and the issues raised therein for evidence of decisions that may be arbitrary capricious, fraudulent, or clearly erroneous; and (2) provides the same time limits for the hearings officer to make the decision as those that were included for the Circuit Court in Act 175 (SLH 2009) which sunset as of July 1, 2011.



This bill is necessary to allow public works projects to move forward by avoiding drawn out bid protests and bad precedence for construction related cases. The *de novo* process means a new trial by a different tribunal. Under the current law, the protestor has two chances to appeal on totally different basis (i.e. an appeal at procuring agency and a second opportunity “anew” at the OAH level). The current process results in stalled projects, prolonged evidentiary hearings, and bad precedence for the construction industry.

Additionally, the following factors should also be considered:

- **Increase cost** – A bid protest based solely on a technical error or subcontractor listing could end up costing the states thousands if awarded to the 2<sup>nd</sup> and 3<sup>rd</sup> lowest bidder. For example, in the Bolton case involving improvements to Honokohou Small boat Harbor, taxpayers paid 44% more because the contract was awarded to the second lowest bidder.
- **Prolongs process and stalls projects** - Current OAH review delays decisions and delays start of project;
- **De Novo process would require more experts and the evidentiary hearing would draw out the process.** The OAH is considering issues that were not initially raised before the procuring agency, allowing the protestor an opportunity to make additional claims not originally considered.

For the above mentioned reasons, GCA is in strong support of H.B. 2044, HD1 and respectfully requests that this Committee pass the measure.

Thank you for the opportunity to provide our views on this measure.

# HEALY TIBBITTS BUILDERS, INC.

General Contractors  
99-994 Iwaena Street • Suite A • Aiea, Hawaii 96701  
Telephone: (808) 487-3664 • Facsimile: (808) 487-3660

Via E-mail: [FINTestimony@capitol.hawaii.gov](mailto:FINTestimony@capitol.hawaii.gov)  
Facsimile: (808) 586-0001

February 27, 2012

TO: HONORABLE REPRESENTATIVES MARCUS OSHIRO, CHAIR,  
MARILYN B. LEE, VICE CHAIR AND MEMBERS OF THE HOUSE COMMITTEE  
ON FINANCE

SUBJECT: **STRONG SUPPORT OF H.B. 2044, HD1, RELATING TO PROCUREMENT.**  
Limits the hearing officer's review to the record of the procuring agencies below.  
Limits the review to a review of the written record of the procuring agency's  
protest proceedings for evidence of decisions that may be arbitrary, capricious,  
fraudulent, or clearly erroneous. Effective July 1, 2112.

## HEARING

DATE: Monday, February 27, 2012  
TIME: 11:30 a.m.  
PLACE: Conference Room 308

Dear Chair Oshiro, Vice Chair M. Lee and Members of the Committee:

Healy Tibbitts Builders, Inc. **strongly supports** H.B. 2044, HD1 Relating to Procurement.

H.B. 2044, HD1 proposes to limit a hearing officer's review of the procuring agency's decision in a bid protest under section 103D-701, HRS, by removing *de novo* review, unless the procurement officer's decision is found to be arbitrary, capricious, fraudulent, or clearly erroneous.

Healy Tibbitts Builders, Inc. supports H.B. 2044, HD1. The intent of the bill is to simplify and expedite the procurement appeal process by recognizing the procuring agency's experience and expertise in the procurement process, while preserving the right of review of a procuring agency's decision to the Department of Commerce and Consumer Affairs (DCCA) Office of Administrative Hearings (OAH).

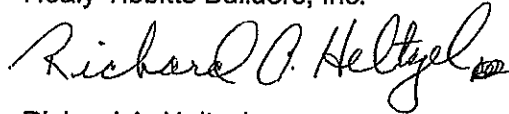
This bill retains a bid protester's right to a hearing before the OAH, but limits the hearing officer's review to the record of the procuring agencies decision below. Under this bill, the OAH review is generally limited to a review of the written record of procuring agency's protest proceedings for evidence of decisions that may be arbitrary, capricious, fraudulent, or clearly erroneous.

This bill balances the desire to expedite procurements delayed by constant protest appeals while preserving a limited right of review of a procuring agency's decision to the DCCA OAH.

For the above mentioned reasons, Healy Tibbitts Builders, Inc. is in strong support of H.B. 2044, HD1 and respectfully requests this Committee to pass this measure.

Thank you for the opportunity to provide our views on this measure.

Very truly yours,  
Healy Tibbitts Builders, Inc.

A handwritten signature in black ink, reading "Richard A. Heltzel". The signature is written in a cursive style with a large, stylized "R" and "H". There is a small mark at the end of the signature that looks like a flourish or a small "e".

Richard A. Heltzel  
President

# KING & NEEL, INC.

1164 Bishop Street • Suite 1710 • Honolulu, Hawaii 96813

Telephone: (808) 521-8311

Fax: (808) 526-3893

February 27, 2012

NATIONAL ASSOCIATE MEMBER



TO: HONORABLE REPRESENTATIVES MARCUS OSHIRO, CHAIR,  
MARILYN B. LEE, VICE CHAIR AND MEMBERS OF THE HOUSE COMMITTEE  
ON FINANCE

SUBJECT: **STRONG SUPPORT OF H.B. 2044, HD1, RELATING TO PROCUREMENT.**  
Limits the hearing officer's review to the record of the procuring agencies below.  
Limits the review to a review of the written record of the procuring agency's  
protest proceedings for evidence of decisions that may be arbitrary, capricious,  
fraudulent, or clearly erroneous. Effective July 1, 2112.

## HEARING

DATE: Monday, February 27, 2012

TIME: 11:30 a.m.

PLACE: Conference Room 308

Dear Chair Oshiro, Vice Chair M. Lee and Members of the Committee:

**King & Neel, Inc strongly supports H.B. 2044, HD1 Relating to Procurement.**

H.B. 2044, HD1 proposes to limit a hearing officer's review of the procuring agency's decision in a bid protest under section 103D-701, HRS, by removing *de novo* review, unless the procurement officer's decision is found to be arbitrary, capricious, fraudulent, or clearly erroneous.

King & Neel, Inc. supports H.B. 2044, HD1. The intent of the bill is to simplify and expedite the procurement appeal process by recognizing the procuring agency's experience and expertise in the procurement process, while preserving the right of review of a procuring agency's decision to the Department of Commerce and Consumer Affairs (DCCA) Office of Administrative Hearings (OAH).

This bill retains a bid protester's right to a hearing before the OAH, but limits the hearing officer's review to the record of the procuring agencies decision below. Under this bill, the OAH review is generally limited to a review of the written record of procuring agency's protest proceedings for evidence of decisions that may be arbitrary, capricious, fraudulent, or clearly erroneous.

This bill balances the desire to expedite procurements delayed by constant protest appeals while preserving a limited right of review of a procuring agency's decision to the DCCA OAH.

For the above mentioned reasons, King & Neel, Inc. is in **strong support** of H.B. 2044, HD1 and respectfully requests this Committee to pass this measure.

Thank you for the opportunity to provide our views on this measure.